IN THE FLORIDA SUPREME COURT

CASE NO: 69,494

HAROLD C. KRAMER and
JOAN W. KRAMER,

Appellants,

vs.

PIPER AIRCRAFT CORPORATION,
a Pennsylvania corporation,

Appellee.
_____/

ON CERTIFICATION FROM THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

This supplemental brief is filed pursuant to this Court's order dated July 31, 1987. The purpose of this supplemental brief is to present argument in regard to the constitutionality of this Court's decision in Bates v. Cook, Inc., 12 F.L.W. 397 (Fla. July 16, 1987). Kramer relies on its brief of Appellant in regard to all other issues presented to the Court.

STATEMENT OF THE CASE AND FACTS

As reported by the Eleventh Circuit Court of Appeals in its decision of Kramer v. Piper Aircraft Corp., 801 F.2d 1279 (11th Cir. 1986), the Kramers were injured when the aircraft in which they were passengers crashed in Virginia on December 6, 1975. On March 30, 1978, approximately two years and four months after the crash, the Kramers filed their complaint naming Piper, the manufacturer of the airplane, as Defendant. The complaint asserted four different theories of recovery: negligence, strict liability, breach of implied warranty of fitness, and breach of implied warranty of merchantability.

The parties stipulated to a number of facts. The design, manufacturer, and testing of the aircraft occurred in Florida. The sale of the aircraft took place in Philadelphia, Pennsylvania. At the time of the crash, the Kramers were residents of New Jersey, although they now are residents of Florida. The final flight of the aircraft commenced and terminated in Virginia. Prior to the

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crash, the airplane had been flown a total of seventeen (17) hours, six (6) to seven (7) of which were consumed in the flying the aircraft from Florida to Pennsylvania and the rest in pilot familiarization and a flight from Philadelphia to Virginia. The preparatory servicing for the final flight was performed in Pennsylvania.

The trial court entered summary judgment for Piper on the grounds that the Kramers' action was barred by the two year Virginia Statute of Limitations. It reasoned that the Virginia Statute of Limitations applied because under Florida's "borrowing statute," Florida Statutes §95.10, the causes of action "arose" in Virginia, where the crash and injuries occurred. The Eleventh Circuit Court of Appeals remanded the case to the trial court for further consideration in light of this Court's decision of Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980). The trial court again entered judgment for Piper. The Kramers appealed and the Eleventh Circuit Court of Appeals certified two questions to this Court, one concerning the construction of §95.10.

The Eleventh Circuit Court of Appeals stated that although the certified question in Bates deals only with the cause of action for "theft of trade secrets," it is likely the courts response will be relevant to tort actions in general. In answering the question certified in the present case, the Florida Supreme Court may choose to consider that issue in this case along with Bates. On May 5, 1987, this Court heard oral argument in the instant case and in Bates.

LEGAL ARGUMENT

I.

ADOPTION OF THE SIGNIFICANT RELATIONSHIPS TEST TO DETERMINE WHERE A CAUSE OF ACTION ARISES FOR CONFLICT OF LAW PURPOSES DOES NOT VIOLATE THE FLORIDA CONSTITUTIONAL BAR AGAINST JUDICIAL LEGISLATION

A. Bate's decision serves the legislative intent of the borrowing statute.

Prior to the enactment of the borrowing statute, the Florida Statute of Limitations was applied to cases filed in Florida courts where the cause of action arose in another state. This application of the Florida Statute of Limitations unfairly exposed the defendant in the other state to suit even where the statute of limitation in the other state had expired, "breathing life into state claims." In addition to this unjust result, the blanket application of the Florida Statute of Limitation resulted in forum shopping and increased the load on the courts of this state for foreign portion and causes of action arising elsewhere.

In response to these problems, the Florida legislature enacted the borrowing statute over 100 years ago. Since then, the legislature has not indicated that its original intent underlying the borrowing statute's reinactment has changed. The "sole star" of statutory construction is to carry out the original legislative intent.

Recently, however, that original legislative intent has been frustrated by the borrowing statute itself. In the advent of air travel, asbestos, and other modern innovations, the lex loci doctrine application to the borrowing statute also resulted in inequitable results. For example, the statute of limitation of a state where a fortuitous airplane accident occurrs determines whether the cause of action is barred, regardless what paramount interest Florida or another state may have in the outcome of the litigation.

This Court responded to this problem in Bates by rejecting the lex loci doctrine's application to the borrowing statute. Instead, this Court applied the significant relationships test. Applying the significant relationships test to the borrowing statute will result in the application of the statute of limitation in the state with the most significant relationship to the litigation, and not the statute of limiation in the state where the injury incurred. This outcome will decrease forum shopping and achieve results more consistent with the legislative intent underlying the borrowing statute. Thus, this Court did not violate the Florida Constitution in Bates since Bates only furthers the original legislative intent.

B. Adopting the significant relationships test for conflict of law purposes does not constitute judicial legislature since statutory interpretation is not involved.

The question of whether this Court in Bates, altered its previous construction of Florida's borrowing statute never arises because Bates did not, in any manner, affect the application of the

statute. Bate's rejection of lex loci delicti in favor of the significant relationships test did not constitute judicial legislation. This Court simply adopted a substantive conflicts of law approach to statute of limitations problems and did not involve statutory interpretation. The statute remains unchanged. Once a court determines that the cause of action arose in another state, the statute is applied in the same manner as it was prior to Bates.

Florida's borrowing statute is triggered only upon a finding that the cause of action arose in another state. Meehan v. Celotex Corporation, 466 So.2d 1100 (Fla. 3rd DCA 1985); Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L. Rev. 33, 47 (1962). The borrowing statute does not indicate how a court should determine where a cause of action "arises." Traditionally, courts followed the rule of lex loci delicti, under which a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred. See Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). In Bates the significant relationships test was adopted. Under Bates the proper statute of limitation to apply in tort actions involving more than one state is that of the state having the most "significant relationship" to the occurrence and the parties.

Piper contends that by rejecting lex loci and adopting the significant relationships test, this Court engaged in impermissible judicial legislation. In support of its argument, Piper cites cases where courts were prohibited from legislating judicially. See Gulfstream Park Racing Ass'n., Inc. v. Department of Business

Regulation, 441 So.2d 628, (Fla. 1957); Advisory Opinion to the Governor, 96 So.2d 541, 546 (Fla. 1957); Delaney v. State, 190 So.2d 578 (Fla. 1966); Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964).

The critical distinction that Piper fails to make, however, is that Bates, unlike each of the cited cases, did not involve statutory interpretation. Nowhere in Bates did this Court state that it was interpreting the borrowing statute. On the contrary, this Court stated that its "ruling does not do violence to Florida's borrowing statute. We simply hold that the significant relationships test should be employed to decide in which state the cause of action 'arose.'" Bates, at 397. Thus, this Court did not engage in judicial legislation. It simply eliminated the distinction between procedure and substance on statute of limitation problems and adopted a substantive conflicts of law approach.

C. Even if adoption of the significant relationships test did involve statutory interpretation, it was permissible because the rule that the legislature adopts the judicial construction placed upon a statute when it reenacts such a statute is inapplicable where the existing construction is not clear and definite.

The general principle that the legislature adopts the judicial construction placed upon a statute when it reenacts such a statute presupposes that the existing construction is ascertainable. See Gulfstream Park Racing Ass'n., Inc. v. Department of Business Regulation, supra; Advisory Opinion to the Governor, supra; Delaney v. State, supra; Collins Investment Co. v. Metropolitan Dade County, supra. If the judicial construction is not ascertainable,

logic dictates that the rule is inapplicable because then a court will have no way of determining the legislature's intent when it reenacted the statute. When a statute does not have an ascertainable construction, this Court is free to interpret the statute in a manner that best serves its underlying policy. Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985).

In each of the cases Piper cites, no evidence emerges of any confusion as to the statute's existing judicial construction. See Gulfstream Park, supra; Advisory Opinion of the Governor, supra; Delaney, supra; and Collins Investment Co., supra. The respective courts therefore have no difficulty in determining the legislature's intent when it reenacted the statute. In contrast, the borrowing statute in the case at bar did not have a definite construction. Courts and scholars alike have "been forced to make a variety of interpretations often preplexing and unpredictable, offering little guidance to litigants as to where a cause of action will be deemed to arise." Morley, Applying the Significant Relationships Test to Florida's Borrowing Statute, 59, No. 7, Fla. B.J. 17 (July-August, 1985).

For purposes of tort actions, this Court originally determined where a cause of action arises by applying the lex loci delicti doctrine. Colhoun, at 21. The lex loci delicti rule meant that the cause of action "arises" in the jurisdiction "where the last act necessary to establish liability occurred." Colhoun, at 21. Eight years later, Bishop rejected the inflexible lex loci delicti doctrine in the related conflict of laws area. In its place, this

Court adopted the more flexible and modern significant relationships test. Bishop, at 1001.

Following Bishop, it became unclear whether this Court had also rejected lex loci for purposes of the borrowing statute. Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983). In Pledger, the court stated that it had "no hint of the legislative will on the question of determining where a cause of action arises.

> They may have assumed the Bishop conflicts rule would determine where a cause of action arises. They might equally have assumed that Bishop, a case dealing exclusively with the substantive rights and liabilities of the parties have nothing to do with the procedural borrowing statute. Pledger, at 1331.

The Pledger court ultimately decided that the legislature could have also assumed that Bishop dealt solely with substantive rights and therefore held Bishop inapplicable. Pledger, at 1331. Based upon the assumptions of what this Court meant in Bishop and what the Florida Legislature thought the Supreme Court meant in Bishop, it can be reasonably assumed that Pledger did not resolve the confusion surrounding the borrowing statute.

Following Pledger, two other cases and a recent Bar Journal article demonstrated the confusion surrounding application of Florida's borrowing statute. Meehan, at 1100; Proprietor's Ins. Co. v. Valsecchi, 435 So.2d 290 (Fla. 3d DCA 1983).

The fact that the Eleventh Circuit Court of Appeals certified Bates and the instant case to this Court, is itself further evidence of the confusion as to the statutes proper construction.

At the very least, the aforementioned cases demonstrate great confusion as to how this Court after Bishop should properly determine where a cause of action arises. An ascertainable construction of the borrowing statute simply did not exist. Accordingly, the rule that the legislature adopted the judicial construction placed upon a statute when it reenacts such statute is inapplicable. This Court therefore has the inherent power to interpret the borrowing statute in a manner that best serves its underlying policy. See Lowry v. Parole and Probation Commission, supra.

D. Even assuming an ascertainable judicial construction of the borrowing statute exists, this Court may modify a previously accepted doctrine or overrule a former decision.

The rule that the legislature's reenactment of the statute demonstrates adoption of the judicial construction is not one of absolute binding force and does not prevent this Court from modifying a previously accepted doctrine or overruling a former decision. Ellis v. Department of Labor and Industries, 567 P.2d 224 (1977); In Re: Elliott's Estate, 1566 P.2d 427, 439 (1945); Reynolds v. Continental Mortgage Co., 377 P.2d 134 (1962); American Ins. Co. v. Iaconi, 89 A.2d 142 (1952). A court may modify a previously accepted doctrine or overrule a former decision if it better serves the underlying intent of the legislature. Ellis, supra. Rejecting lex loci in favor of the significant relationships test better serves the policies underlying the borrowing statute because the new test decreases forum shopping and results in more equitable outcomes. Morley, Applying the Significant Relationships

Test to Florida's Borrowing Statute, 59, No. 7, Fla. B.J. 17 (July-August, 1985).

Most scholars now agree that statute of limitations and related borrowing statutes should not be given an automatic inflexible application because of antiquated substance/procedure labels applied before the significant relationships test evolved. R. Weintraub, Comment on the Conflict of Laws, §3.202 (3d ed. 1986); Lorenzen, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492 (1919); Reese, The Second Restatement of Conflict of Laws Revisited, 34 Mercer L. Rev. 501 (1983). Although the American Law Institute (ALI) refused to adopt a proposed revision to §142 of the Restatement (Second) of Conflict of Laws, this action should not be viewed as an objection to adopting a "significant relationship" test to statute of limitation issues. A closer examination of the debate surrounding the revision to §142, reveals that substantially all of the controversy occurred over subsection 2 and did not involve the significant relationship test in subsection 1. 55 U.S.L.W. 2653-54 (June 12, 1987).

Notwithstanding any commentary, the Bates decision itself is strong evidence that this Court supports the position that the significant relationships test is the better way to resolve the conflict of law issues inherent in the borrowing statute. To suggest that this Court is powerless to decide a case in a manner that better serves the legislatures intent is to give new meaning to form over substance.

II.

APPLICATION OF Bates TO THE INSTANT CASE WOULD NOT VIOLATE THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE PIPER DOES NOT HAVE A VESTED SUBSTANTIVE RIGHT.

Application of Bates to the instant case will not violate Piper's due process rights under the 14th Amendment of the United States Constitution. In order to violate the 14th Amendment by depriving a person of property without due process of law, that person must have a property right in the particular thing which allegedly is being deprived. New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 35 L.Ed. 943, 12 S.Ct. 142. A property right is more than a mere "unliateral expectation" of a benefit, and must arise from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701, (1972).

In the instant case, Piper does not have a vested substantive right under state law entitling it to 14th Amendment protection. Piper's right not to be sued has not vested since the appeal is still pending. Where an appeal is pending, a property interest in not being sued vests only when a final determination has been made by the court. Piper's argument that is has a vested interest in not being sued since the period of limitations has run hinges on the erroneous assumption that the Virginia Statute of Limitation applies. This argument fails to consider that if the Virginia Statute of Limitation is in fact deemed to apply, it is applied only by virtue of the application of the Florida Borrowing Statute.

To determine if the borrowing statute itself applies, it is necessary for a court to determine where the cause of action arose. Piper urges that the pre-Bates lex loci doctrine should be applied to determine where the cause of action arose since applying Bates would likely change the outcome of this determination and divest Piper of its vested property right. However, this argument ignores the United States Supreme Court holding in Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 85 L.Ed. 327, 61 S.Ct. 347 (1941) and its progeny.

In Vandenbark, the United States Supreme Court held a federal appellate court sitting in diversity jurisdiction must apply the state law at the time of the appeal and not at the time the judgment below was entered. Thus, an appellate court must give effect to any intervening state court decisions. Federal courts have consistently followed Vandenbark and have retroactively applied intervening state court decisions even though the state courts applied the decisions prospectively only. Downs v. J.M. Huber Corporation, 580 F.2d 794 (5th Cir. 1978). See also, Bradley v. General Motors, 512 F.2d 602 (6th Cir. 1975); Pyler v. Wheaton Van Lines, 640 F.2d 1091 (9th Cir. 1981); Commerce Oil Refining v. Mines, 303 F.2d 125 (1st Cir. 1962).

The Sixth Circuit Court of Appeals applied Vandenbark to a case factually analogous to the case at bar in Williams v. Singer Co., 457 F.2d 799 (6th Cir. 1972). In Williams, the plaintiff's products liability action was dismissed when the District Court held the action was barred by the one (1) year period of limitation which began to run from the date of sale. While the appeal was pending,

the Tennessee Supreme Court ruled that where an injury provides benefits to the injured person under Workmens' Compensation, the period of limitation begins to run from the date of injury, and not the date of sale. The appellate court, in accordance with Vandenbark, remanded the case in light of the Tennessee Supreme Court's recent decision despite the lapse of the original period of limitation.

The facts in Williams and the instant case are very similar. In both cases, the district courts held the causes of action were barred by the then existing periods of limitation. During the pendency of both appeals, the state supreme courts rendered decisions which potentially removed the plaintiffs' bar to bringing the causes of action. Similarly, the appellate court in the case at bar is required under Vandenbark to apply the law existing at the time of the appeal and not at the time the district court's judgment was rendered.

Thus, Piper does not have a vested property interest in not being sued since this right must be determined at the time of appeal, taking into consideration this Court's most recent decisions. Since application of state law has not yet determined whether Piper in fact has a vested property interest in not being sued, Piper's property interest is merely a "unilateral expectation" of a benefit. This Court's affirmation of Bates will therefore not violate the 14th Amendment of the United States Constitution since Piper has no vested right of which it is being deprived.

CONCLUSION

This Court should reaffirm and make final its decision and opinion in Bates. If this Court chooses to make its decision final, Bates should be applied to this case and the answer to question 2 certified to this Court should be that the Florida Statute of Limitations applies as Florida's borrowing statute is not applicable.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was hand-delivered to James E. Tribble, Esquire and Douglas H. Stein, Esquire, Blackwell, Waler, Fascell & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33133 and mailed to Herbert Lee Allen, Jr., Esquire and Lavinia K. Dierking, Esquire, Duckworth, Allen, Dyer, P.A., 400 West Colonial Drive, P.O. Box 3791, Orlando, Florida, 32802; Vincent O. Wagner, Esquire and Steve Zlatos, Esquire, Woodward, Weikart, Emhardt & Naughton, One Indiana Square, Suite 2000, Indianapolis, Indiana 46203; and Thomas R. Julin, Esquire, Steel, Hector and Davis, 4000 S.E. Financial Center, Miami, Florida 33133-2398 this 24th day of August, 1987.

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